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Is Religious Freedom under threat from British Equality Laws?

Julian Rivers¹

A series of cases, some of them with a high media profile, suggest that freedom of religion or belief in the United Kingdom is being undermined by the operation of new equality laws. This article outlines the constitutional context for liberty and equality rights as well as the main ways in which religious liberty is secured by and within equality law. However British equality law puts pressure on religious liberty in four ways: (1) it confines the relevance of 'religion' to limited social contexts; (2) it creates a priority for equality-perspectives over liberty-perspectives on social conflict; (3) it generates new social assumptions about what individuals have to believe and say (or refrain from saying) if they are to be trusted to uphold the law; (4) it provides legitimation for the imposition of contested comprehensive equality doctrines, some of which are inimical to civil liberty. In response, it is important to emphasise the role of equality law as a tool to secure mutual toleration and equal rights in the face of religious and ethical disagreement.

Key words: religious liberty; equality; constitutional rights; liberalism

Introduction: liberty and equality under the New Constitution

When the Human Rights Act 1998 was introduced into Parliament it provoked considerable concern from religious groups that their liberties would be restricted by new claims of rights on the part of antagonistic or dissenting individuals.² The concern exposed a misunderstanding: human rights are enforceable primarily against public bodies and they include the right 'either alone or in community with others and in public or private, to manifest [one's] religion or belief, in worship, teaching, practice and observance.'³ It is true that the case-law of the European Court of Human Rights was only just starting to develop the collective aspects of freedom of religion or belief,⁴ and indeed the case-law on individual freedom of religion or belief was still fairly rudimentary as well,⁵ but both individual and collective dimensions of that right were already familiar from other sources in international human rights law. The main effect of the Human Rights Act 1998 has been to turn freedom of religion or belief from a merely residual liberty – the space left by the absence of any limiting laws – into a positive legal claim. In the event, the British Government met this rather unfocused set of concerns about human rights with a single provision: in cases involving collective aspects of religious freedom, courts are to have regard for 'the particular importance' of this right.⁶ It is no surprise that human rights claims against religious groups have been rare and unsuccessful.⁷

Although the concerns were legally misconceived in the case of the Human Rights Act 1998, the underlying intuition was not. But it was another pillar of New Labour's constitutional reform agenda

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² The debates are summarised in Julian Rivers, 'From Toleration to Pluralism: Religious Liberty and Religious Establishment under the United Kingdom's Human Rights Act' in Rex J. Ahdar (ed.) *Law and Religion* (Aldershot: Ashgate, 2000), 133-161.

³ European Convention on Human Rights, art. 9.

⁴ Julian Rivers, 'Religious Liberty as a Collective Right' in Richard O'Dair and Andrew Lewis (eds.), *Law and Religion* (Oxford: Oxford University Press, 2001), 227-246.

⁵ The first major case on article 9 was decided in May 1993: *Kokkinakis v Greece* (1994) 17 EHRR 397.

⁶ Human Rights Act 1998, s. 13. The section has had a minimal impact. However, see *Re H (Article 9: Freedom of Religion)* [2016] UKUT 286 (IAT): s. 13 is a freestanding provision requiring separate consideration in immigration cases.

⁷ This is true even for the Church of England, which although 'public' in some sense benefits from the protection of article 9. See *Holy Monasteries v Greece* (1995) 20 EHRR 1; confirmed for the Church of England in *Aston Cantlow and Wilmcote with Billesley PCC v Wallbank* [2003] UKHL 37.

which provided a much more plausible ground for concern. The extension and systematisation of equality law was the effect of new commitments in the EU Treaty of Amsterdam 1997 to ‘take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.’⁸ In time this led to the Equal Treatment Directive 2000 establishing a general framework for laws against discrimination in employment and occupation.⁹ It was implemented in the UK along with other reforms in the first decade of the 21st century culminating in a major codification in the Equality Act 2010. From being a relatively small and discrete area of law designed to tackle social problems of racial and sexual discrimination, equality law has been expanded to cover a wide range of ‘protected characteristics’. It operates by imposing obligations on all those who engage with the general public as employers, educators, by offering goods and services or in other similar ways. It is highly detailed, enforceable, and with effective remedies.¹⁰ In this it differs significantly from human rights law, which is based on broad general principles, only binds public authorities directly, and outside the public law context is only relevant to the interpretation of existing law. It is this relatively new and complex body of equality law which has given rise to a series of cases, sometimes with a high media profile, in which religious freedom and equality obligations have come into conflict.

Some examples illustrate the range of cases involved: in *Percy v Board of National Mission of the Church of Scotland*, the House of Lords decided that the decision of that church to dismiss Rev. Helen Percy for sexual impropriety was subject to the jurisdiction of secular courts to consider an allegation of unlawful sex discrimination.¹¹ We always used to think that the courts of the Church of Scotland were free from secular judicial oversight in matters of doctrine, worship, government and discipline; apparently not in the face of equality law. At the end of 2008, *Catholic Care* in the Diocese of Leeds ceased to be eligible to place children for adoption, because it refused to place children with same-sex couples – a policy made unlawful by the Equality Act (Sexual Orientation) Regulations 2007. In the *JFS* case, the Supreme Court decided that the JFS (formerly the Jews Free School) had discriminated unlawfully on grounds of race in adopting a matrilineal test of Jewish identity for their pupil selection criteria.¹² In *Hall v Bull*, the Supreme Court decided that the Christian owners of a B&B had acted unlawfully in refusing a double-bedded room to a same-sex couple.¹³ And in 2017, the Court of Appeal decided that a Muslim school had acted unlawfully in segregating boy and girl pupils.¹⁴

However, two recent cases suggest that the seemingly inexorable march of equality law may have been checked. In October 2018, the Supreme Court reversed the decisions of the county court and Court of Appeal of Northern Ireland, to find that a bakery run by Christian proprietors had not, after all, acted unlawfully in refusing to decorate a cake with the slogan, ‘Support Gay Marriage’.¹⁵ And in July 2019, the Court of Appeal allowed an appeal by a student social worker against his university’s

⁸ Treaty on the Functioning of the European Union, art. 10. See also Charter of Fundamental Rights of the European Union (2000/C 364/01), art. 21.1.

⁹ Directive 2000/78/EC. For background, see Julian Rivers, ‘In Pursuit of Pluralism: the Ecclesiastical Policy of the European Union’ (2004) 7 *Ecclesiastical Law Journal* 267-291; id., ‘Law, Religion and Gender Equality’ (2007) 9 *Ecclesiastical Law Journal* 24-52.

¹⁰ For a general account, see Bob Hepple, *Equality: The Legal Framework*, 2nd edn. (Oxford: Hart Publishing, 2014).

¹¹ [2005] UKHL 73.

¹² *R(E) v JFS Governing Body* [2009] UKSC 1.

¹³ [2013] UKSC 73. See also *Black v Wilkinson* [2013] EWCA Civ 820.

¹⁴ *Chief Inspector of Education, Children’s Services and Skills v Interim Executive Board of Al-Hijrah School* [2017] EWCA Civ 1426.

¹⁵ *Lee v Ashers Baking Company Ltd.* [2018] UKSC 49.

decision that social media postings expressing his view that homosexual acts are sinful rendered him unfit to practise.¹⁶ In both cases the courts were critical of action taken by others in the name of 'equality' and sought to clarify what the law does, and does not, require. Although there are still important questions to be asked about the boundaries of equality law and religious liberty, it is the gap between what the law actually requires and what people think it requires that lies at the heart of their problematic relationship.

Freedom of religion or belief within equality law

It is inevitable and unsurprising that there should be tensions between religious liberty and equality law. Inevitably, the new equality obligations constrain liberty – the liberty to act in ways which the legislature considers undesirable. The only conditions under which such laws would not constrain religious liberty would be ones in which either: (1) religions never adopt criteria which diverge from general standards of non-discrimination, (2) the religious activities in question are never legally relevant, or (3) the law makes sufficient provision for religious individuals and groups to comply with the precepts of their religion.

The first possibility can quickly be discounted. Religious groups must discriminate – i.e. draw distinctions – at least in respect of religion, and typically in respect of other characteristics as well. Male-only priesthood is an obvious example, as are celibacy or other sexual lifestyle requirements. A religious group cannot sustain its distinctive identity unless it does so. Such distinctions may be unjust in a public context but entirely necessary in a religious context. To reject a potential employee on account of their theological heterodoxy would be intolerable behaviour on the part of a public administrator but an essential part of the role of a church ministerial selection board. This is simply social pluralism in practice, and equality law recognises it in exemplary form when it excludes 'single characteristic associations' (i.e. those whose main purpose is to bring together people who share a certain characteristic) from the non-discrimination obligations applying to membership in associations generally.¹⁷

The second possibility – that some religious disputes are legally irrelevant – is one which the law adopts from time to time.¹⁸ The litigation in *Moore (or Preston) v President of the Methodist Conference* shows the potential that this approach has for securing religious liberty.¹⁹ Ms Preston alleged unfair dismissal in the process surrounding her removal as a licensed preacher, but the Supreme Court upheld the pre-*Percy* position that the terms of her relationship with the Methodist Church were not those of employment or any other type of contract sufficient to bring her within the scope of employment law. Religious and ethical disagreements are not in themselves subject to legal regulation, a clear example in the legislation being the fact that decisions about acts of worship in schools with a religious character cannot be made the subject of a discrimination claim.²⁰

However, the attempt to confine all religious questions to an extra-legal social space can lead to bizarre conclusions. *Khaira v Shergill* was a dispute between two factions as to which controlled a Sikh temple.²¹ The answer turned on the trusts under which the temple was established, which

¹⁶ *R (Ngole) v The University of Sheffield* [2019] EWCA Civ 1127.

¹⁷ Equality Act 2010, s. 107(9) and schedule 16, para. 1. The exclusion does not apply in relation to colour (as opposed to race), nor does it apply to political parties.

¹⁸ *R v Chief Rabbi ex parte Wachmann* [1992] 1 WLR 1036; *Blake v Associated Newspapers Ltd* [2001] 3 WLUK 6.

¹⁹ [2013] UKSC 29.

²⁰ Equality Act 2010, schedule 11, para. 6.

²¹ [2014] UKSC 33.

unfortunately referred to some rather difficult and contested points of Sikh theological doctrine. The judges of the High Court and Court of Appeal said that the point was so difficult they were entirely incapable of determining it. It took the Supreme Court to restore sense: a legal system cannot tolerate a situation in which a court of law refuses to say who owns a particular piece of property. A judge simply has to take evidence and do the best he or she can. Religious property is still property and must have an owner. By the same token, employment does not cease to be employment because it is for the purposes of an organised religion; goods and services can be religious in nature; education can take place with a religious purpose and ethos. To deny the overlap between religions and private right is radically to disempower, and we might even say *outlaw* religious groups. That is not religious liberty.

This makes the third possibility unavoidable: special provision has to be made for religious individuals and groups within equality law. This has been done in several different and rather nuanced ways: the law distinguishes between organisations with an ethos based on religion or belief, organisations related to religion or belief, and organised religions, allowing each type different degrees of departure from general non-discrimination norms. The law contains specific protection for individuals and organisations with an ethos based on religion or belief to impose a requirement on employees to be of that religion or belief so long as it is proportionate in the light of the nature and context of the work.²² Organisations relating to religion or belief are exempt from claims of discrimination in relation to religion or belief when they restrict membership, participation in activities, the provision of goods, facilities or services, or the use or disposal of premises.²³ In contrast to the employment provisions, there is no proportionality test here. Instead, the restriction has to be because of the purpose of the organisation or to avoid causing offence on grounds of religion or belief to persons of that religion or belief.²⁴ Organisations relating to religion or belief may have many different purposes such as: to practise a religion or belief, to advance a religion or belief, to teach its practice or principles, to enable persons of that religion or belief to receive any benefit or engage in any activity within its framework, or to foster or maintain good relations between persons of different religions or beliefs, so long as their sole or main aim is not commercial.²⁵ Schools with a religious ethos are subject to separate and detailed regulation determining the respects in which they can, and cannot, take their religion into account in the operation of the school.²⁶

It is noticeable that very little of the litigation has concerned claims of *religious* discrimination by religious groups or individuals. European human rights law is clear that in cases of conflict between an individual and his or her religious group over matters of doctrine, the freedom of the individual is generally protected by the right of exit.²⁷ Assuming the religious group has not itself acted against its own internal constitution it is hard to see how the solution could be any different. If it were, the identity of the religious group would be perpetually vulnerable and unstable. This point, and its logical outworking within equality law, seems relatively uncontroversial.

²² Equality Act 2010, schedule 9, para. 3. Some provision is thus made for commercial companies to have a religious ethos.

²³ Schedule 23, para. 2(3).

²⁴ Para. 2(6).

²⁵ Paras. 2(1) and (2).

²⁶ The framework is set out in Julian Rivers, *The Law of Organised Religions: Between Establishment and Secularism* (Oxford: Oxford University Press, 2010), 251-267.

²⁷ *Hautaniemi v Sweden*, no. 24019/94 (1996).

Where tensions have arisen, they have mostly been between claims of religious freedom and non-discrimination on other grounds, primarily those of sex, gender and sexuality. Here, too, the law has been drafted to allow religious groups considerable leeway to dissent from majority views on such matters. In the context of employment, requirements to be of a particular sex, not to be a transsexual person, not to be married or in a civil partnership (either generally or in a same-sex relationship), not to be divorced and remarried, or any requirement relating to sexual orientation may be imposed so long as one of two conditions is fulfilled: to comply with the doctrines of the religion or to avoid conflict with the strongly held religious convictions of a significant number of the religion's followers.²⁸ Similar tests apply in relation to sexual orientation to questions of membership, participation in activities, the provision of goods, facilities or services, or the use or disposal of premises.²⁹ And the same test is applied to religious services which are segregated or limited to persons of one sex for the purposes of an organised religion.³⁰ The 'compliance' and 'non-conflict' principles are lightly redrafted versions of the old test contained in sex discrimination legislation preserving male-only priesthood.³¹ Carried over into the new context of implementing the EU Equal Treatment Directive, they proved controversial, but they survived legal challenge on account of the relative narrowness of their terms.³²

Some of the litigation which has arisen in this area can be seen simply as a result of adjustment to the formality and rigidity which legal regulation brings in its wake.³³ Even where liberty has been preserved, it is no longer the empty space of non-law. Other litigation has been a result of heightened public awareness, and, one suspects, legislative oversight. Once the House of Lords had decided in *Mandla v Dowell Lee* that the Race Relations Act 1976 covered ethno-religions such as Sikhism and Judaism, there was a potential problem with any religious test operated by such groups.³⁴ In applying an ethno-religious test for school admissions, the JFS had been acting in a way which, strictly speaking, had been made unlawful decades before – but presumably nobody noticed, or cared, or thought they could do anything about it.

However, some of the litigation has resulted from the fact that the law is based on a fairly narrow view of the salience of religion or belief in the lives of individuals. Equality law tends to confine religion to a particular social sphere (church and its functional extensions and equivalents) which is then largely exempt from its writ. But once one steps outside that sphere, and the sphere of private, personal relations more generally, the possibilities for dissent from social norms become much smaller. The question is whether that narrowing of the religious sphere is a necessary price to pay in the context of increasing diversity of opinion.

The priority of an equality-perspective

Strictly speaking, liberty and equality do not conflict. Rather, they offer complementary normative perspectives. It is undoubtedly a restriction of my liberty when I am told that I cannot exercise discretion over who I allow to stay in my Bed & Breakfast. But it is also a restriction of my liberty when I am asked intrusive questions about my personal life and turned away when I turn up. It is

²⁸ Schedule 9, para. 2.

²⁹ Schedule 23, para. 2

³⁰ Schedule 3, para. 29.

³¹ Sex Discrimination Act 1975, s. 19, now repealed.

³² *R (Amicus) v Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin).

³³ See, for example, *Reaney v Hereford Diocesan Board of Finance* [2007] 4 WLUK 179. That churches can successfully insist on traditional standards of sexual lifestyle is amply demonstrated by *Pemberton v Inwood* [2018] EWCA Civ 564.

³⁴ [1983] 2 AC 548.

undoubtedly a restriction on equality when I cannot live openly with my same-sex partner because of social disapproval of my relationship. But it is also a restriction on equality when I cannot live openly with my religion because of legal restrictions on the contexts in which I can live consistently with its precepts. There is a liberty-perspective and an equality-perspective on both sides of such disputes. Not all of these can be expressed in legal terms, but one can often argue for the same outcome based either on a right to liberty, such as under the Human Rights Act 1998, or on a right to equality, such as under the Equality Act 2010.

However, the two perspectives are not identical. Rather, they emphasise slightly different aspects of the situation. In general terms, the purpose of laws against discrimination is to redress pervasive disadvantages suffered by one group compared to its cognate groups.³⁵ The equality-perspective emphasises relative group disadvantage, and this can be fatal to a liberty claim presented under this guise. To give a concrete example: the Muslim woman objecting to workplace uniform rules which prevent her from wearing a headscarf can be met with the argument (a) that plenty of non-religious people find uniform rules irksome and would be similarly treated (no relative disadvantage); or (b) not every Muslim woman sees the need to wear a headscarf, so it is not a core feature of being Muslim (no relevant group identity).³⁶ The focus of equality law on group disadvantage can suppress both the distinctive force of religious motivation and the possibility of personal conviction. This runs the risk of assimilating some religious obligations to personal tastes.³⁷

Ideally, one would expect all equality- and liberty-perspectives to be taken into account within the law. Generally speaking, both European human rights law and European Union law seek to do this. They are constructed around the idea of balancing rights and other constitutional goods by way of the doctrine of proportionality. This is very clear in the case of article 14 ECHR (non-discrimination in the enjoyment of rights), which asks of every differentiation whether it can be justified.³⁸ In EU-based law also, the idea of indirect discrimination invites balancing between the burdensome impact of the problematic 'provision, criterion or practice' and the reasons the discriminator has for adopting it.³⁹ National laws implementing equality obligations can obstruct such proportionality analyses both by giving overbroad exemptions to religious groups and individuals and by failing to take proper account of religious liberty concerns. For example, German law, which gives extensive exemptions to religious organisations, including health and welfare institutions run by churches, has come under pressure from both the European Court of Human Rights and the Court of Justice of the European Union for failing to conduct a proportionality-analysis in such cases.⁴⁰ One could consider Nadia Eweida's case as the mirror-image of this: the European Court of Human Rights criticised the English courts for failing appropriately to balance the interest of British Airways in maintaining their neutral corporate image with her interest in wearing a discrete cross.⁴¹

³⁵ Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford: Oxford University Press, 2015).

³⁶ Whether the claimant is *actually* met with this response, as opposed to a justification for the restriction, varies somewhat. Compare, for example, *Azmi v Kirklees MBC* [2006] 10 WLUK 171 (ET) and [2007] 3 WLUK 818 (EAT) with *Noah v Desrosiers*, ET case no 2201867/07 (justification failed) or *Achbita v G4S Secure Solutions NV* (C-157/15) [2017] CMLR 21 (justification succeeded).

³⁷ I explore this point at greater length in Julian Rivers, 'The Secularisation of the British Constitution' (2012) 14 *Ecclesiastical Law Journal* 371-399.

³⁸ *D.H. v Czech Republic* (2008) 47 EHRR 3.

³⁹ Equality Act 2010, s. 19.

⁴⁰ *Schüth v Germany* 1620/03 (23/09/2010); *Obst v Germany* 425/03 (23/09/2010); *Siebenhaar v Germany* 18136/02 (03/02/2011); *Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* (C-414/16) [2019] 1 CMLR 9; *IR v JQ* (C-68/17) [2019] 1 CMLR 16.

⁴¹ *Eweida v British Airways plc* [2010] EWCA Civ 80; *Eweida v United Kingdom* (48420/10) (2013) 57 EHRR 8.

However, the scope for taking account of liberty-perspectives within equality law is limited. In some respects, the law is too rigid. There is a particular problem with direct discrimination, which occurs when one person treats another less favourably because of a protected characteristic.⁴² There are some exceptions, but as equality law has expanded it is not clear that all the necessary exceptions have been identified. In some cases, the judiciary have felt boxed in by this structural restriction, and have been tempted to blur the boundaries of direct and indirect discrimination to win themselves the desired discretion.⁴³

In other contexts, there may be some scope for judicial discretion which can be used to incorporate greater sensitivity to liberty-perspectives. For example, the Court of Appeal has warned against using too rigid a definition of group to exclude claims based on the religious views of minorities within minorities.⁴⁴ In the *Ashers* case, judicial discretion arose from the fact that the claim of discrimination being made was based on a novel extension of the law.⁴⁵ The argument was made that the bakery had discriminated by association. This normally arises when one person is discriminated against by virtue of their personal relationship to another – in a typical example, where an employee is treated adversely because she has a disabled child. Here, the suggestion was that the content of the message alone was enough to create a nexus with a protected class, and it was the novelty of this extension which allowed the Supreme Court to prefer the liberty principle protecting against compelled speech instead.

However, in general terms the very different ways in which equality and human rights (including liberty rights) have been legally implemented creates a structural imbalance in favour of equality-perspectives. Liberty-perspectives are secondary and interstitial by comparison, dependent both on identifying the possibility for judicial discretion and persuading the judge in question to exercise it. The difficulty facing those who would challenge restrictions on their religious liberty is that it is relatively easy to justify such restrictions as ‘necessary in democratic society ... for the protection of the rights and freedoms of others’.⁴⁶ And what rights could be more important than equality rights?

Equality law and equality policy

So far we have identified two problems with equality law from the perspective of freedom of religion or belief. First, the new laws have had to specify the relevance of religion in ways which previously were left unregulated. This has the effect of confining the relevance of religion into conventional or mainstream social forms. Secondly, the nature of equality law is such as to give the perspective it provides a certain priority over liberty. The liberty-perspective is relevant, but secondary. Both of these points could be accused of legalism; they focus on the letter of the law and its implementation in the course of litigation. The third problem is that equality law has provided the justification for changes to social policy which give ‘equality’ an increasingly high salience in everyday life. This is arguably of far greater significance than the occasional, even high profile, litigation. Two features of this new social context are worth noting.

First of all, the promotion of equality (and, increasingly, ‘diversity and inclusion’) has become a matter of active policy for public bodies and employers. To some extent this is legally mandated,⁴⁷

⁴² Equality Act 2010, s. 13.

⁴³ See Lady Hale JSC in *R(E) v JFS Governing Body* [2009] UKSC 1 at [69]-[71].

⁴⁴ *Mba v Merton LBC* [2013] EWCA Civ 1562.

⁴⁵ *Lee v Ashers Baking Company Ltd.* [2018] UKSC 49.

⁴⁶ European Convention on Human Rights, art. 9 para. 2.

⁴⁷ Equality Act 2010, s. 149. See Julian Rivers, ‘Promoting Religious Equality’ (2012) 1 *Oxford Journal of Law and Religion* 386-401.

but in many cases it is justified indirectly as a tool to avoid unlawful discrimination, harassment and victimisation in the workplace. Some employers can adopt the risk-averse assumption that their comprehensive equality policies are legally required; others may embrace them out of moral conviction or simply good practice. Several of the clashes between 'religion' and 'equality' have come about when employees have fallen foul of such policies. Islington Borough Council was not required by law to dismiss Lilian Ladele as a registrar for refusing to conduct civil partnership ceremonies.⁴⁸ It chose to do so in the name of their equality and diversity policy. The Belgian Security Company, G4S, were not obliged to prohibit Ms Achbita from wearing an Islamic headscarf. They choose to do so to project an image of corporate neutrality towards their customers. The Grand Chamber of the European Court of Justice confirmed that it was legitimate for the company to pursue such a policy – so long as it carried that policy through consistently.⁴⁹ So, they did need to offer Ms Achbita work which was not customer-facing, but if that was not possible, corporate public neutrality, which is a rather French type of equality policy, could win.

Secondly, in some rather obscure sense equality has acquired a constitutional status which enables it to limit other human rights. Courts have recognised the fact that some Acts of Parliament benefit from a higher, 'constitutional' status, in the sense that they are immune from accidental or implied repeal.⁵⁰ The Equality Act 2010 does not fall into that class. However, elements of equality law are rooted in the Human Rights Act 1998, which is a 'constitutional statute', and in EU law, which for now has higher status by virtue of the European Communities Act 1972. Much more significant is the diffuse sense that equality is substantively constitutional, for example in the existence and remit of the 'Equality and Human Rights Commission'.⁵¹ Like human rights, equality has become something from which no reasonable person would dissent. There is a certain slippage from the foundational claim of the Universal Declaration of Human Rights that 'all human beings are born free and equal in dignity and rights'⁵² to the idea that equality law, and indeed any specific conception of how that law should be implemented, benefit from the same foundational character.

This new sense that equality is a matter of fundamental public policy gives it something of the character of a state-sanctioned ideology. In both the *Ashers* case and the more recent case of *Ngole*, courts have started to push back against this assumption. In *Ashers* it would seem as if many of the lawyers involved, as well as the Equality Commission of Northern Ireland, assumed that opposition to same-sex marriage was in some sense 'discriminatory' and that the refusal to bake a cake promoting it had to be unlawful.⁵³ But as Lady Hale explained, the evidence was that the bakery had both employed and served gay people in a non-discriminatory way, nor did they refuse to decorate the cake because Mr Lee was himself gay or associated with gay people. They refused because they disagreed with the political campaign for same-sex marriage.⁵⁴ In other words, the court drew a clear line between respect for rights in the treatment of others and agreement with their opinions or lifestyle.

⁴⁸ *Ladele v Islington LBC* [2009] EWCA Civ 1357; *Ladele v United Kingdom* (51671/10) (2013) 57 EHRR 8.

⁴⁹ *Achbita v G4S Secure Solutions NV* (C-157/15) [2017] CMLR 21. But in *Boungaoui v Micropole SA* (C-188/15) [2017] 3 CMLR 22, compliance with customer wishes was *not* a legitimate reason for banning the headscarf.

⁵⁰ *Thoburn v Sunderland City Council* [2001] EWHC195 (Admin); *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3 at [207]; *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 at [66]-[67].

⁵¹ Established under the Equality Act 2006. There are different arrangements in Scotland and Northern Ireland.

⁵² UDHR, art. 1.

⁵³ The ECNI received a mild judicial rebuke for their partiality: *Lee v McArthur* [2016] NICA 55 at [106]; *Lee v Ashers Baking Company Ltd.* [2018] UKSC 49 at [14].

⁵⁴ *Lee v Ashers Baking Company Ltd.* [2018] UKSC 49 at [28].

That line has been reinforced by the judgment of the Court of Appeal in *Ngole*. The court found that in dismissing the claimant from his social work programme for posting his views on the sinfulness of homosexual behaviour on social media, the university had acted disproportionately. They added this:

The situation was not helped by the terse - and arguably inaccurate - terms in which the complaint against the Appellant was initially recorded, namely him posting "views of a *discriminatory* nature" in breach of the HCPC Code and regulations (see the "Departmental Form for Recording Fitness to Practise Case"). The mere expression of religious views about sin does not necessarily connote discrimination.⁵⁵

The Court noted the way in which preventing the expression of 'discriminatory views' had become the overriding objective of the university's disciplinary processes. They then traced the oppressive implications of such a position.⁵⁶ Instead of a blanket ban, the questions should have been whether there was any evidence that Ngole would actually discriminate in practice (there was not) and whether he recognised the importance of expressing his legitimate views in such a way as to give assurance to others that he would not discriminate unlawfully in practice (which required a further hearing).

Both cases demonstrate the potential that equality policy has for infringing rights, and the need to focus attention on the central question, which is respect for rights to equal treatment regardless of moral and religious disagreement.

Comprehensive equality doctrines

The previous section has suggested that the over-zealous implementation of blunt equality policies can be detrimental to the protection of rights and is in practice a more significant threat to religious liberty than the law it claims to serve. This final section explores the possibility that there is a deeper social shift in our understanding of equality which may be even more damaging to civil liberty.

Jeremy Waldron closes his account of the Christian foundations of John Locke's political theory with the suggestion that equality struggles for justification in the absence of a suitable comprehensive doctrine.⁵⁷ In his recent book, *One Another's Equals*, Waldron explores this possibility further.⁵⁸ Some theologians have addressed the question of equality by reference to a single property of human beings – as Nicholas Wolterstorff has argued, we are each other's equals in dignity and rights because we are all equally loved by God.⁵⁹ Others have identified a foundation in the *imago dei*.⁶⁰ But Waldron is admirably comprehensive:

'instead of just looking for a property or a set ... of properties whose static possession is supposed to confer sanctity equally on every human person, we should think instead of the importance that attaches to the commonality of human nature inasmuch as the same story of creation, life, faith, sin, penitence, and redemption is to be told about us all, each and every one of us.'⁶¹

⁵⁵ *R (Ngole) v The University of Sheffield* [2019] EWCA Civ 1127 at [115].

⁵⁶ *Ibid.*, at [127].

⁵⁷ Jeremy Waldron, *God Locke and Equality* (Cambridge: Cambridge University Press, 2002), 243.

⁵⁸ Jeremy Waldron, *One Another's Equals: The Basis of Human Equality* (Cambridge, Mass.: The Belknap Press, 2017).

⁵⁹ Nicholas Wolterstorff, *Justice: Rights and Wrongs* (Grand Rapids: Eerdmans, 2008), ch. 16.

⁶⁰ Roger Ruston, *Human Rights and the Image of God* (London: SCM Press, 2004).

⁶¹ Waldron, *One Another's Equals*, 205.

Waldron accepts that in a modern society not everyone will find inspiration in this religious narrative, but contrary to those liberal theorists who would secularise public reason, he defends robustly the right of each of us to give the fullest and most honest explanation in public as to why we hold the fundamental political beliefs we do. As Christians, believing that we are one another's equals is part of our basic account of the world.⁶²

Waldron seems to assume that we can arrive at a common understanding of legal equality from a variety of different religious and ideological starting-points. In that sense he shares John Rawls's liberal optimism that reasonable people can converge on an overlapping consensus about the basic principles of justice. And indeed, this may well be true at a high enough level of abstraction. Most of us do believe in 'basic human equality'. The troubling question is whether our foundations matter in practice. Do we converge on a common conception of equality, or do we find ourselves in deep-rooted disagreement over what equality means and requires of us? The suspicion that we might not converge is already suggested by Waldron's reference to 'creation'. On a traditional Christian account, that includes creation as male and female, and marriage as the divine joining of the two in an inseparable union.⁶³ Such a conception of equality is hardly a point of contemporary convergence!

There are plenty of other indicators that comprehensive equality doctrines differ significantly from each other in their practical implications. Ten years ago, Rowan Williams, then Archbishop of Canterbury, made his famous speech floating the possibility that a greater role could be given to Shariah Courts within the British legal systems.⁶⁴ The fury of the response to that speech was astonishing. Much of it was simply ignorant. What the Archbishop was suggesting was little more than the practice currently adopted by Jewish tribunals. But the response was not just a matter of ignorance. In more measured tones Lord Phillips, soon to be President of the new Supreme Court, reasserted the principle of one law for all – a common law which treats us equally regardless of our religious differences.⁶⁵ This was a debate about what it means to treat British Muslims as equals. Does it require a more multicultural (collective) understanding of equality in which communities are able to govern themselves according to their own norms, or does it require a more liberal understanding, in which individual human persons are given the same rights and opportunities?⁶⁶

It is plausible to suppose that part of the hostility to Rowan Williams' suggestion lay in the fact that socially dominant conceptions of equality are much more individualistic, not to say secular. For such a comprehensive account, we could do worse than turn to the work of Ronald Dworkin. In his last great work, *Justice for Hedgehogs*, Dworkin argues that human dignity should be interpreted in terms of two principles: self-respect and authenticity.⁶⁷ Respect for oneself as author of one's own life is what ultimately grounds morality (respect for others). Authenticity means 'expressing yourself in your life, seeking a way to live that grips you as right for you and your circumstance'.⁶⁸ These two

⁶² See Julian Rivers, 'Equality, Christianity and Global Law' in John Witte Jr. and Rafael Domingo (eds.), *Christianity and Global Law* (London: Routledge, forthcoming).

⁶³ Matthew 19:4-6.

⁶⁴ Rowan Williams, 'Civil and religious law in England: a religious perspective' (2008) 10 *Ecclesiastical Law Journal* 262-282.

⁶⁵ Lord Phillips of Worth Matravers, 'Equality before the Law', a speech given at the East London Muslim Centre on 3 July 2008, widely reproduced, including at (2008) 161 *Law and Justice* 75-87.

⁶⁶ Compare, for example, Bhikhu Parekh, *Rethinking Multiculturalism: cultural diversity and political theory* (Basingstoke: Macmillan Press, 2000) with Brian Barry, *Culture and Equality* (Cambridge: Polity, 2001).

⁶⁷ Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, MA: The Bellknap Press, 2011), 202-214.

⁶⁸ *Ibid.*, 209.

principles underlie familiar features of the liberal polity such as the basic right of all people to equal concern and respect and the right to ethical independence.

In his turn to an aesthetic of individual human self-creation Dworkin captures something of the (post)modern ethos of equality. The obligation to avoid discrimination is not derived from a common human nature, for there is no such thing – at least, not in any normative sense. Rather, our opinions, lifestyles and ethical choices merit mutual respect by virtue of the fact that we have made them our own in self-originating acts of authenticity.⁶⁹ In spite of the admittedly Nietzschean overtones of this conception of human value, Dworkin strongly resists a collapse into solipsism or nihilism.⁷⁰ Although we have no choice but to construct morality and ethics in a morally inert universe, there really are better and worse ways of living. Authenticity cannot plausibly mean just anything, nor can respect for others. Dworkin's anti-foundationalist position still depends on a robust intersubjectively-binding rationality, but those of a more rigorously postmodern sensibility will suspect that 'authenticity' extends also to human perception and reason.⁷¹

Reconceiving equality within a postmodern epistemological frame can have catastrophic implications for civil liberty. If our religions and worldviews are each self-constructed, entirely unconstrained by any shared 'reality', we cannot actually disagree about them. Differences of opinion merit no refutation, merely respect for diverse but equally valid ways of looking at the world. If, furthermore, speech is treated in Foucauldian fashion as an assertion of power, all attempts to persuade others of our beliefs are not merely pointless, they are suspect. Dissenters can be cast as micro-aggressive violators of safe spaces (that is, the illusory security of the worlds we construct for ourselves), and debate shut down in the name of justice. Mutual toleration ceases to be acceptable as a political *modus vivendi*, for toleration presupposes a distinction between who a person is and what they believe and do.⁷² Rather, toleration has to be replaced by inclusivity, understood in this context as the uncritical embrace of the self-defined other. Equality law increasingly operates in the context of a postmodern comprehensive equality doctrine which in its concern to treat each individual equally does indeed want to target 'discriminatory views', because it sees freedom of conscience, freedom of expression and freedom of association – in short, freedom of religion – as a political failure to address the social causes and ideological manifestations of oppression.

In Nietzsche's own provocative terms, having 'killed God' we ourselves have to become gods to justify our deed.⁷³ Even if, unlike Nietzsche, we want to believe that we are all equally gods, such an apotheosis of the individual is diametrically opposed to the Islamic idea of a complete community subordinating itself to external laws given by a just God (who is radically other, and emphatically not dead). Its foundation is also very different from Waldron's Christian narrative of creation, sin and redemption, a narrative of human beings in dynamic relationship with a God of love. And it easily

⁶⁹ Ronald Dworkin, *Justice for Hedgehogs*, especially 258-260. In earlier work, Dworkin was more cautious about the moral implications of his position. See *Sovereign Virtue* (Cambridge, Mass.: Harvard University Press, 2000), 442-446: 'Playing God is indeed playing with fire. But ... the alternative is cowardice in the face of the unknown.' Or, perhaps, humility before the God who has made himself known (Acts 17:23)?

⁷⁰ Dworkin insists that Nietzsche himself was no nihilist: 'he was aware of only three people whose lives were truly great. One of them was himself.' *Justice for Hedgehogs*, 213.

⁷¹ See, classically, Michel Foucault, *Madness and Civilisation* (1961) English translation by Richard Howard (London: Tavistock Publications, 1971).

⁷² See, e.g., Susan Mendus, *Toleration and the Limits of Liberalism* (London: Macmillan, 1989).

⁷³ Bernard Williams (ed.), *The Gay Science* (1882) (Cambridge: Cambridge University Press, 2001), para. 125, 120.

tosses to one side the unsupported constructions of Dworkinian secular liberalism.⁷⁴ The worry is that equality law might increasingly be used as a pretext for the imposition of such a comprehensive equality doctrine, which only escapes notice because it is not conventionally religious.

Conclusion: the struggle for equal rights

Considerable debate has opened up in recent years about the supposedly Christian origins of the Universal Declaration of Human Rights.⁷⁵ The question is not simply on what basis we can assert that we human beings are all 'born free and equal in dignity and rights'.⁷⁶ It is why our basic human equality should give rise to *this* particular set of rights. If there is an influence, it is likely to be much longer and much more diffuse than the sort of mid-20th century revival Samuel Moyn, for one, has posited.⁷⁷

This opens up a troubling prospect, at least, troubling to anyone committed to a version of political liberalism. If equality can only be justified by reference to some comprehensive doctrine or worldview, if that foundation impacts on the meaning and implications of equality for practical legal and policy purposes, and if some of those comprehensive equality doctrines actually undermine the standard canon of civil and political rights characteristic of political liberalism, are we not caught on the horns of an uncomfortable dilemma? It seems that either we must abandon our commitment to equal rights, or we must abandon the claim to political legitimacy anchored in our supposed neutrality between competing comprehensive doctrines.

The worry is not simply a theoretical one. The view that a postmodern conception of equality underlies social policies and expectations, that it has the backing of law, and the status of a constitutional fundamental, is a dangerous one. It even has the potential to reintroduce a confessional state, albeit one based on the implausible religion of self-worship. For now, English law is resisting these pressures. Notwithstanding the ire of some commentators, the judgment of the Supreme Court in *Lee v Ashers Baking Company Ltd.*, and more recently still the Court of Appeal's judgment in *Ngole*, show that equality law is not simply the expansionist vehicle for a post-liberal conception of equality, or indeed of any particular conception. Roughly speaking, and with inevitable imperfections, it seeks to preserve a balance of constitutional rights.

⁷⁴ For similar critiques of all secular attempts to ground equality, see Louis Pojman, 'On Equal Human Worth: A Critique of Contemporary Egalitarianism' in Louis P. Pojman and Robert Westmoreland, *Equality: Selected Readings* (New York: Oxford University Press, 1997). See also Steven D. Smith, 'Equality, Religion and Nihilism' in Rex Ahdar (ed.), *Research Handbook on Law and Religion* (Cheltenham: Edward Elgar Publishing, 2018).

⁷⁵ Samuel Moyn, *Christian Human Rights* (University of Pennsylvania Press, 2015).

⁷⁶ UDHR, art. 1.

⁷⁷ See Dan Edelstein, *On the Spirit of Rights* (University of Chicago Press, 2019). A closer attention to comparative constitutional history exposes the substantial degree to which the UDHR was the culmination of 200 years of constitutional development.